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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-985

CALIFORNIA BANKERS ASSOCIATION,
Appellant,

vs.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al.,
Appellees.

No. 72-1073

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al.,
Appellants,

vs.

CALIFORNIA BANKERS ASSOCIATION,
FORTNEY H. STARK, JR., et al.,
Appellees.

No. 72-1196

FORTNEY H. STARK, JR., et al.,
Appellants,

vs.

GEORGE P. SHULTZ, SECRETARY OF THE TREASURY, et al.,
Appellees.

On Appeals from the United States District Court for the Northern District of California

BRIEF FOR THE APPELLEE
California Bankers Association

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BRIEF FOR THE APPELLEE

California Bankers Association

INTRODUCTION

In October, 1970, Congress enacted legislation that has come to be known as the Bank Secrecy Act.[1]

The Act has two parts. Title I and its implementing regulations require banks and other financial institutions to copy and retain virtually every piece of paper that passes through the American banking system. Titles II and III require banks among others to report automatically certain domestic and foreign currency transactions.

These cases came to court in June, 1972, with suits by the California Bankers Association (CBA), a number of individuals, a bank, and the American Civil Liberties Union, attacking both the Act's recordkeeping and reporting requirements.

In the fall of 1972, a three-judge court filed a memorandum decision and entered an order (1) denying motions to enjoin the Act's recordkeeping provisions, but (2) granting motions to enjoin the Act's domestic reporting requirements. Both the private litigants and the government have appealed.

This brief is in response to the government's appeal, and will explain why we believe the Bank Secrecy Act's automatic reporting requirements to be in violation of the Fourth and Fifth Amendment standards established by this Court.

OPINION BELOW

The opinion of the District Court is included in the Single Appendix ("App.") at 75-93, and is reported at *Stark v. Connally*, 347 F. Supp. 1242 (N.D. Cal. 1972).

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1. Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114, *et seq.*, (12 U.S.C. §§ 1829b, 1951-1959 and 31 U.S.C. §§ 1051-1122.)

JURISDICTION

These appeals comprise two consolidated cases.

On October 18, 1972, a three-judge court convened pursuant to 28 U.S.C. § 2282 (Act of June 25, 1948, ch. 646, 62 Stat. 968), denied motions to enjoin enforcement of the Act's recordkeeping provisions, but granted an injunction enjoining enforcement of the domestic reporting requirements. (App. 94-95).

The government filed a notice of appeal to this Court in both cases on November 13, 1972. (App. 96-99). The CBA and the various plaintiffs in the *Stark* case noticed appeals to this Court on November 16 and 17, 1972, respectively. (App. 100-103).

The jurisdiction of this Court to hear the government's appeal is based on 28 U.S.C. §§ 1252 and 1253. (Act of June 25, 1948, ch. 646, 62 Stat. 928, as amended).

QUESTIONS PRESENTED

(1) Do the mandatory reporting requirements of the Bank Secrecy Act violate Fourth Amendment search and seizure standards?

(2) Do the mandatory reporting requirements of the Bank Secrecy Act give adequate notice as required by the due process clause of the Fifth Amendment?

(3) Does Section 103.22 of the Bank Secrecy Act regulations violate the Act?

(4) Are the reporting requirements of the Bank Secrecy Act so inexorably tied to the Act's recordkeeping provision as to render both unconstitutional for the same reasons?

(5) Does the California Bankers Association have standing to assert the constitutional rights of its members and their customers in this litigation?

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the United States constitution are set forth in *Appendix A* to this brief. The Bank Secrecy Act is set forth in *Appendix B*. The Act's implementing regulations, including amendments, are set forth in *Appendix C*.

STATEMENT

Background—In December, 1969, legislation leading to enactment of the Bank Secrecy Act was introduced in the House of Representatives.[2] A short time later, similar though somewhat broader legislation was introduced in the Senate.[3]

Hearings were held in June, 1970. The legislation was actively supported by the Department of Justice.[4]

The Bank Secrecy Act, combining and modifying the Senate and House bills, was then approved by the Congress and signed into law by the President on October 26, 1970. The Secretary of the Treasury promulgated implementing regulations on March 31, 1972.

Purpose—The primary objective of the Bank Secrecy Act is the detection of crimes and the apprehension of criminals. That fact is not in dispute.

The government, for example, has said that the Act is designed "to reduce white collar crime by making [bank records] more accessible to law enforcement officials." (Govt. Brief 3). The Act is said to curtail "the use of financial institutions, both domestic and foreign, in furtherance of

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2. H.R. 15073, 91st Cong., 1st Sess. (1969).

3. S. 3678, 91st Cong., 2d Sess. (1970).

4. See generally, *Hearings on H.R. 15073 Before the House Committee on Banking and Currency*, 91st Cong., 1st and 2d Sess. (1970); and *Hearings on S. 3678 and H.R. 15073 Before the Subcommittee on Financial Institutions of the Senate Committee on Banking and Currency*, 91st Cong., 2d Sess. (1970).

criminal activities . . ." (Govt. Brief 12), and is said to be "eminently useful" in providing law enforcement authorities with evidence of white collar crimes. (Govt. Brief 18).

That the Bank Secrecy Act's primary goal is the detection of crimes and the apprehension of criminals is, in any event, apparent from the Act's legislative history.[5] The original House bill was submitted in response to an "increase in criminal activity" involving the use of financial institutions.[6] The bill's chief sponsor, Representative Patman, in debate on the House floor, said it was prompted by the belief of law enforcement officials "that an effective attack on organized crime requires the maintenance of adequate and appropriate records by financial institutions."[7]

In the Senate, the Act's purpose was said to be providing "law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime."[8] The reporting requirements, in particular, were assumed to "aid law enforcement authorities to prosecute U.S. criminals,"[9] and "to provide law enforcement authorities with greater evidence of financial transactions in order to reduce the incidence of white-collar crime."[10]

In summary, the primary goal of the Bank Secrecy Act is the detection of crimes and the apprehension of criminals. That fact, as we have said, is not in dispute.

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5. See generally, pages 19-27 of the Stark Brief (No. 72-1196) where the plaintiffs quote extensively from the legislative history in support of their contention that the "dominant—almost exclusive—purpose" of the Bank Secrecy Act is "to create and collect evidence of crime." *Id* at 19.

6. H.R. Rep. 91-975, 91st Cong., 1st Sess. 10 (1970). 2 U.S. Code Cong. & Admin. News 4394 (1970).

7. 116 Cong. Rec. 16950 (1970).

8. S. Rep. 91-1139, 91st Cong., 2d Sess. 1 (1970).

9. *Id.* at 7.

10. *Id.* at 1.

Nor does the Act have anything to do with the regulation of banks and other financial institutions, as such—a conclusion the government does not dispute. Indeed, no dispute is possible. The legislative history of the Bank Secrecy Act is completely devoid of any suggestion that the Act is in any way related to the regulation of America's financial institutions.

The Statutes and Regulations—The Bank Secrecy Act has two parts. Title I has been used to compel banks and other financial institutions to microfilm or otherwise copy virtually every piece of paper that passes through the American banking system. (See Sections 101 and 102 of the Act, and Section 103.34 of the Regulations.) Title II requires banks and other financial institutions to report certain domestic and foreign currency transactions. (See Sections 221 and 223 of the Act, and Sections 103.22-103.24 of the Regulations.)

The Act's recordkeeping requirements (Title I) are the subject of appeal by the various private litigants. (Nos. 72-985 and 72-1196). The government in turn has appealed the District Court's order enjoining the operation and enforcement of the Act's domestic reporting requirements. (No. 72-1073). This brief is in reply to the government's appeal.

The Act's domestic reporting requirement (Title II) are set forth in Sections 202-223. Section 202 provides that the purpose of the reporting provisions is to require reports or records having "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." The Act then defines terms (Section 203); authorizes implementing regulations (Section 204); arms the Treasury Secretary with criminal and civil enforcement powers (Sections 205 and 207-11); approves dissemination of reported informa-

tion throughout the Federal bureaucracy (Section 212); and authorizes broad-scale exemptions.

> "The Secretary may make such exemptions from any requirement otherwise imposed under this title as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review." (Section 206).

Section 221 then provides:

> "Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe."

Finally, Section 222 provides in part that the required transaction report is to be signed "or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require."[11]

The Treasury Secretary's implementing regulations begin with a finding that the reports required "have a high degree of usefulness in criminal, tax or regulatory investigations

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11. See discussion, *infra*, at 37-39.

or proceedings." (31 C.F.R. § 103.21). The reports required are those for "each deposit, withdrawal, exchange of currency or other payment or transfer . . . which involves a transaction in currency of more than $10,000." (31 C.F.R. § 103.22). An exception is made for transactions made by

> "an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him." *Id.*[12]

Section 103.24 of the Regulations requires, *inter alia,* reports from "[e]ach person subject to the jurisdiction of the United States . . . having a financial interest" in a foreign bank account. Section 103.25 specifies the form and timing of required reports; and pursuant to Section 103.26, banks and others are required to "verify and record the identity" of the person engaged in a transaction for which a report is required.[13]

The information obtained by the Treasury Secretary is to be made available "to any other department or agency of the United States" on written request. (31 C.R.F. § 103.43).[14]

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12. See discussion, *infra,* at 35-37.

13. There appears to be general agreement that the practical effect of 31 C.F.R. § 103.26 is to compel banks and others to verify —in some way—the identity of potential customers before opening an account. See, The American Bankers Association, Operational Guidelines for Compliance By Commercial Banks with the Treasury Regulations On Financial Recordkeeping and Reporting of Currency and Foreign Transactions (1972).

14. After this litigation began and the decision of the District Court was known, various sections of the regulations, including 103.43, were amended. See 37 Fed. Reg. 23114 (1972) and 38 Fed. Reg. 2174 (1973). The amendments, included in *Appendix C,* do not affect these consolidated appeals. Section 103.43 for example, now provides that "information made available . . . shall be received

Finally, the Secretary has assumed authority, "in his sole discretion" to "make exceptions to or grant exemptions from the requirements of" the regulations.

> "Such exceptions or exemptions may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary."[15]

We deem it fair to say that the Bank Secrecy Act regulations—including the Act's current reporting requirements—are subject to immediate, uncontrolled, indiscriminate change. We deem it fair to say, too, that this kind of unrestrained discretion invites political and financial abuse.

The Litigation—This litigation began with a suit by a number of individuals, a bank, and the American Civil Liberties Union of Northern California. (*Stark v. Shultz*). In a separate action a short time later, the California Bankers Association joined in the attack on the Bank Secrecy Act. (*California Bankers Association v. Shultz*).

The plaintiffs in the *Stark* case are Fortney H. Stark, Jr., a bank president and customer; Security National Bank, an insured national bank; Charles C. Marson, a bank customer; the American Civil Liberties Union of Northern California, a non-profit membership corporation; Fred Lieberman, an individual expecting to export monetary instruments; Edward C. Harwood, Carl Bruer and Edward

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. . . in confidence and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought." (31 C.F.R. § 103.43 (1973)).

15. When this litigation began, Section 103.45 was even broader. See 31 C.F.R. § 103.45 in its original form, set forth in *Appendix C* at 43-44.

Durell, individuals maintaining financial interests in and signature authority over one or more bank accounts in foreign countries; and sixteen unidentified additional plaintiffs. The plaintiff in the *California Bankers Association* case is an association comprising all 158 state and national banks doing business in California.

The District Court ordered the two cases consolidated; issued a temporary restraining order enjoining the government from "implementing or enforcing those portions of the Act and Regulations requiring reports by banks, other financial institutions and persons;" (App. 42); and pursuant to 28 U.S.C. § 2282[16], convened a three-judge court to hear and decide the constitutional issues raised by the complaints and motions for a preliminary injunction.

The District Court Opinion—In a memorandum decision dated September 11, 1972, the District Court upheld the Bank Secrecy Act's recordkeeping and foreign transaction reporting requirements. (App. 75-79). But the District Court found the Act's domestic reporting requirements unconstitutional and, with one judge dissenting, issued a preliminary injunction. (App. 79-93, 94-95).

The District Court did not discuss plaintiffs' objections to the Act's recordkeeping requirements. The decision simply states that the court found "no constitutional violation in these record-keeping provisions, as such . . ." (App. 76-77).

Turning to the Act's reporting requirements, the District Court upheld the provisions compelling reports of exports and imports of monetary instruments. (App. 77-79). The Court noted, *inter alia*, that in the case of foreign transactions, the Act contains adequate procedural safeguards:

16. Act of June 25, 1948, c. 646, 62 Stat. 968.

"For example, with respect to enforcement of [Section 231], the Act [Section 235] provides that, if the Secretary has reason to believe that monetary instruments are being transported without reporting or with false reports, he may apply to the Court for a search warrant. Similarly, with respect to enforcement of [Section 241] (foreign transactions) that section provides that no person required to maintain records under the section shall be required to produce or disclose the same except with a duly authorized subpoena or summons as may be otherwise required by law." (App. 79).

There are, however, *no* such safeguards in the case of the Act's domestic reporting provisions. The question, then, in the opinion of the District Court, was whether the broad, unlimited authority of the Treasury Secretary to compel reports in financial transactions from banks, other financial institutions, and their customers without judicial intervention of any kind, "is such an invasion of a citizen's right of privacy as amounts to an unreasonable search within the meaning of the Fourth Amendment." (App. 81).

The District Court noted, first, this Court's recognition of the right of privacy, and cited among other cases, *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Katz v. United States*, 389 U.S. 347 (1967). (App. 82). The District Court noted also that:

". . . communications between banks and their customers are not privileged communications in the technical sense of that term; that bank customers have no rights in bank records; that such records may be subpoenaed from the bank, even over the objection of the depositor, notwithstanding the fact that the records concern the customer's account; that customers have no standing to object to subpoenas requiring their bank to produce records of the customer's accounts and that the production by the bank of its records under sub-

poena is not, as to the customer, either a Fourth Amendment illegal search and seizure nor a Fifth Amendment self-incrimination. *Harris v. United States,* 413 F.2d 316 (9th Cir. 1969). See also, *Galbraith v. United States,* 387 F.2d 617 (10th Cir. 1968); *Application of Cole,* 342 F.2d 5 (2d Cir. 1965); *De Masters v. Arend,* 313 F.2d 79, 85 (9th Cir. 1963)." (App. 84).

The District Court observed, however, that there was no opportunity for judicial supervision or intervention in the case of the Bank Secrecy Act. (App. 85). The Act and its implementing regulations compel reports of certain domestic currency transactions whenever the reporting entity decides they have occurred.[17]

> "The Act challenged . . . makes no provision for any summons, either judicial or administrative, as the means whereby the Secretary can demand reports from banks and their customers concerning the details of their financial transactions. He is empowered to peremptorily require such reports routinely—automatically—from the banks and from all parties and participants in financial transactions without any procedure whereby either the bank or the customer may in advance test the reasonableness of the demand." (App. 86-87).

The District Court opinion concludes that the Act

> ". . . insofar as it authorizes the Secretary to require virtually unlimited reporting from banks and their customers of domestic financial transactions as a surveillance device for the alleged purpose of discovering possible, but unspecified, wrongdoing among the citizenry, so far transcends the constitutional limits, as laid down by the United States Supreme Court for this

17. Determining when a proscribed transaction has occurred may be difficult. See discussion, *infra* at 35-37.

kind of legislation, as to unreasonably invade the right of privacy protected by the Bill of Rights, particularly the Fourth Amendment provision protecting 'the right of the people to be secure in the their persons, houses, papers and effects against unreasonable searches and seizures.'" (App. 91).

The Appeals—The government filed a notice of appeal to this Court on November 13, 1972, seeking review of that portion of the District Court order enjoining the operation and enforcement of the Bank Secrecy Act's domestic reporting requirements. (App. 96-99).

On November 16 and 17, 1972, respectively, the California Bankers Association, and the various plaintiffs in the *Stark* case filed notices of appeal from the District Court's refusal to enjoin the operation and enforcement of the Act's record-keeping provisions. (App. 100-103).

This Court noted probable jurisdiction on October 9, 1973, and the three appeals were consolidated for hearing. (App. 104).

SUMMARY OF ARGUMENT

(1) The reports required by the Bank Secrecy Act violate the standards this Court has established for reasonable search and seizure.

(a) The Bank Secrecy Act was designed to reduce white-collar crime. Yet the reports required by the Act require no warrant, and do not come within any of the recognized exceptions to the warrant requirement. The principles set forth in *United States v. United States District Court*, 407 U.S. 297 (1972)—including specifically a "neutral and detached magistrate"—are destroyed by the reporting requirements of the Bank Secrecy Act.

(b) Even in the case of administrative searches, this Court has required warrants whenever practicable.

Camara v. Municipal Court, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967)

(c) Even if the Bank Secrecy Act is viewed as analogous to an administrative summons, the reporting requirements violate the Fourth Amendment. The reports are not subject to judicial review or supervision, and there is no opportunity for challenge or intervention. As a result, the Act violates the standard set for administrative summonses in such cases as *United States v. Powell*, 379 U.S. 48 (1964).

(d) Finally, even if the reports required by the Act are deemed analogous to the required reports approved in such cases as *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), and *Yakus v. United States*, 321 U.S. 414 (1944), the Act is invalid. The Bank Secrecy Act is not related to any *specific* purpose; is not required to monitor either the reporting entity or the reporting entity's business; and is not in accord with the standards for required records set forth in such cases as *Shapiro v. United States*, 335 U.S. 1 (1948); and *Marchetti v. United States*, 390 U.S. 39 (1968).

(2) In an effort to salvage the Bank Secrecy Act's reporting requirements, the government argues that since the reports required by the Act are based on "the bank's own records, no seizure of any tangible or intangible property of the bank customer is involved." (Govt. Brief 33). The foregoing argument fails for at least two separate reasons. First, the reports required by the Act are *not* based on the banks' own records. Second, even if they were, then the Fourth Amendment operates in favor of the bank to protect those records from unlawful search and seizure.

(3) Narrow application will not salvage an invalid statute. See, e.g., *Katz v. United States*, 389 U.S. 347 (1967).

Hence, even if one assumed a high correlation between crime and $10,000 currency transactions, the requirements of the Fourth Amendment may not be abridged in the name of effective law enforcement.

(4) The Court's interpretation of the Bank Secrecy Act's reporting requirement is justified. The argument that the District Court's interpretation is unnecessarily broad in that it appears to cover copies of personal checks, is irrelevant. The required reports compel banks to provide, in the government's own words, "a summary description of the nature of the transaction, the type, amount and denomination of the currency involved *and a description of the check involved in the transaction.*" (Govt. Brief 15). (Emphasis added).

(5) The Bank Secrecy Act fails to give adequate notice that a proscribed transaction has occurred in violation of the due process requirements of the Fifth Amendment.

(6) The Bank Secrecy Act provides that the required reports be signed *both* by the bank and by the bank customer involved. (Section 222). Section 103.22 of the Regulations, however, eliminates the requirement that the bank customer sign the report, and thereby denies him notice of the report in direct violation of Congressional intent.

(7) Since the Bank Secrecy Act's recordkeeping and reporting are inexorably tied, they are invalid for the same reasons.

(8) The California Bankers Association has standing to assert the rights of its members and their customers. An organization "whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972). Although the government argues that the members of the California Bankers Association have "failed to show that they have sustained

. . . any direct injury as a result of the actual operation of the Act," they argue nonetheless that the reports required by the Act are based on the banks' "own records." To the extent the reports are based on the banks' own records, the banks are entitled to be secure in their papers and effects. Second, "where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves," the standing principles set forth in such cases as *Broadrick v. Oklahoma,* —— U.S. —— 93 S.Ct. 2908, 2915 (1973), do not apply. Here, since the customer is given no opportunity to resist disclosure and in fact no notice that a report will be made, they have "no effective avenue of preserving their rights themselves."

ARGUMENT

1. The Reports Required by the Bank Secrecy Act Destroy the Work of This Court in Defining Reasonable Search and Seizure.

The Bank Secrecy Act was designed, in the government's words, "to reduce white-collar crime." (Govt. Brief 3). We begin then with a brief summary of the search and seizure standards applicable to criminal investigations.

Criminal Investigations—In the case of criminal investigations, a search warrant is required by the Fourth Amendment in all but a few "specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357 (1967). No such exceptions exist here. Engaging in a currency transaction is *not* a criminal act. See *Carroll v. United States,* 267 U.S. 132 (1925). The reports required by the Act are not preceded by a lawful arrest. See, e.g., *United States v. Robinson,* No. 72-936, decided December 11, 1973; and *Agnello v. United States,* 269 U.S. 20 (1925). Nor are the reports evidence in support of a prior lawful arrest. See, *Cooper v. State of California,* 386 U.S. 58 (1967). Nor do currency transactions, as such, endanger

the lives of anyone. See, *Warden Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

The importance of the warrant requirement was recently emphasized in *United States v. United States District Court*, 407 U.S. 297 (1972). The question was whether a search warrant was required by the Fourth Amendment in a situation involving national security. *Id.* at 309. The Court recognized the basic importance of the government's interest (*Id.* at 310-312), but nonetheless stressed the need for a warrant.

> "Over two centuries ago, Lord Mansfield held that common-law principles prohibited warrants that ordered the arrest of unnamed individuals whom the *officer* might conclude were guilty of seditious libel. 'It is not fit,' said Mansfield, 'that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer.' *Leach v. Three of the King's Messengers*, 19 How. St. Tr. 1001, 1027 (1765).
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> "Lord Mansfield's formulation touches the very heart of the Fourth Amendment directive: that, where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation. Inherent in the concept of a warrant is its issuance by a 'neutral and detached magistrate.' *Coolidge v. New Hampshire*, [403 U.S. 443, 453 (1971)]; *Katz v. United States*, [389 U.S. 347, 356 (1967)]. The further requirement of 'probable cause' instructs the magistrate that baseless searches shall not proceed.
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> "These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the executive branch. The Fourth Amendment does not contemplate the executive officers of Government as

> neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate and to prosecute . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." *Id.* at 316-317. (Emphasis in original).

The principles set forth in *United States v. United States District Court* are especially applicable here. We are not concerned with national security, "without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v. New Hampshire,* 312 U.S. 569, 574 (1940). We are concerned instead with the apprehension of white-collar criminals. (Govt. Brief 3). Since their crimes, however serious, do not endanger the government's capacity to function, the warrant requirement is clearly applicable.[18]

The reporting required by the Bank Secrecy Act ignores the value to a free society of a "neutral and detached magistrate." *Coolidge v. New Hampshire,* 403 U.S. 443, 453 (1971). The Act substitutes instead the unlimited discretion of an officer in the executive branch. It allows an administrator to determine when and to what extent a citizen's bank currency transactions will be reported to the Federal bureaucracy. It endows the administrator with investigative and

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18. In *United States v. United States District Court, supra,* the government sought to justify warrantless wiretaps in aid of national security on the ground, *inter alia,* that there had been "1,562 bombing incidents in the United States from January 1, 1971, to July 1, 1971, most of which involved Government related facilities." *Id.* at 311, n. 12.

prosecutorial duties,[19] and then makes him the *sole* judge "of when to utilize constitutionally sensitive means in pursuing [his] tasks." *United States v. United States District Court, supra* at 317.

That we are concerned in this case with financial transactions, rather than telephone conversations, is irrelevant. In both cases, the citizen is simply employing the services of a basic utility to communicate—in one case his role in a bombing,[20] in this case the disposition of his currency. A citizen's use of a bank is no more a waiver of constitutional protection than a citizen's use of a private or public telephone.[21] Privacy is inherent in bank-customer relations,[22] and the use of a bank's services are no more a waiver of privacy than the use of a telephone. Banks, like telephone companies, are agents for their customers' intentions,[23] and as we attempted to make clear in our brief on appeal, a bank checking account affords a profile of the bank customer—social, political and financial—nearly as complete as the transcripts of his telephone conversations.[24]

Since the Bank Secrecy Act authorizes reports of currency transactions and "such other monetary instruments as the Secretary may specify" (Section 221), without the use of a warrant, there is no need to consider whether the Act complies with warrant safeguards. Suffice to say, a statute and regulations requiring immediate reports of all

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19. See Sections 205, and 207-211; and see 31 C.F.R. §§ 103.46, 103.49.

20. See, *United States v. United States District Court, supra,* at 299.

21. See, *Katz v. United States,* 389 U.S. 347 (1967).

22. *Peterson v. Idaho First Nat. Bank,* 83 Idaho 578, 367 P.2d 284, 290 (1961); and see CBA Brief 34-35.

23. For example, and pursuant to Section 4-201 of the Uniform Commercial Code (1966), banks are agents and subagents for the payor/owner of an item, such as a check, deposited for collection.

24. See, CBA Brief 19.

but an irrelevant class of $10,000 currency transactions, cannot substitute for probable cause—"the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness . . ." *Camara v. Municipal Court*, 387 U.S. 523, 534. (1967).

If, as the government appears to contend, the Fourth Amendment warrant requirement can simply be replaced by an administrator's finding that certain activity has "a high degree of usefulness in criminal, tax and regulatory investigations and proceedings," then the Fourth Amendment has surely been repealed.

If the government can simply decide that certain events (e.g., telephone calls between suburban and ghetto areas, the sale of expensive autos to buyers with poor educations) have "a high degree of usefulness in criminal, tax and regulatory investigations and proceedings," then there is no limit to the reports the government may require.

If the government can brush aside Fourth Amendment limitations by a simple finding that various papers and effects are useful, then the historic work of this Court in balancing competing interests will be destroyed.[25]

Administrative Searches—Even if we ignore legislative history,[26] and the government's recognition that the Bank Secrecy Act is designed to detect white-collar crime,[27] and turn instead to the Fourth Amendment standards applicable to an administrative investigation, one finds similar stress on the importance of a warrant.

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25. See, e.g., *Shapiro v. United States*, 335 U.S. 1 (1948); *United States v. United States District Court*, 407 U.S. 297 (1971); and see generally, Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 Calif. L. Rev. 1011 (1973).

26. See discussion, *infra*, at 4-6; and see Stark Brief 19-27.

27. Govt. Brief 3.

In *Frank v. Maryland*, 359 U.S. 360 (1959), the Court upheld the arrest of a defendant who had refused to allow a health inspector to search his house for rats without a warrant. Mr. Justice Frankfurter, writing for a divided Court, ruled that the arrest did not violate the Fourth or Fourteenth Amendments. Seventeen years later, *Frank v. Maryland* was largely overruled in *Camara v. Municipal Court*, 387 U.S. 523 (1967).

> "[A]dministrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, such searches when authorized and conducted without a warrant procedure, lack the traditional safeguards which the Fourth Amendment guarantees to the individual, and that the reasons put forth in Frank v. Maryland and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the Fourth Amendment's protections." *Id.* at 534.

In a companion case, *See v. City of Seattle*, 387 U.S. 541 (1967), the Court ruled that the principle announced in *Camara* was applicable to a commercial structure.

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." *Id.* at 543.

The Court then noted the crucial distinction between the right to inspect and the means of inspection.

> "The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search

by designating the needed documents in a formal subpoena. In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *Id.* at 544-545.

While *Camara* and *See* are thought to overrule *Frank v. Maryland, supra,* there was at least a specific finding by the Maryland health inspector in the *Frank* case that the defendant's house was in an "'. . . extreme state of decay,'" and that "in the rear of the house there was a pile later identified as 'rodent feces mixed with straw and trash and debris to approximately half a ton.'" *Frank v. Maryland, supra* at 361. Even though the search in the *Frank* case was conducted without a warrant, it was aimed at a particular house for a particular reason, explained in writing by the administrator involved.

No such protection exists here. Common to *Camara, See* and *Frank v. Maryland* is the notion that the search be (1) justified, (2) specific, and at least in the case of *Camara* and *See,* (3) pursuant to a warrant. Here, even assuming they could be justified, the reports required by the Bank Secrecy Act are *not* specific and do *not* permit judicial review. The occurrence of the proscribed transaction gives rise to the required report. There are no means available for judicial review.

Engaging in a currency transaction is not the same as selling guns or liquor. See, *United States v. Biswell,* 406 U.S. 311 (1972) and *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970). In the foregoing cases, the government "knew with certainty that the premises searched were in fact utilized for the sale of liquor or guns." *Almeida-Sanchez v. United States,* —— U.S. ——, 93 S.Ct. 2535, 2539 (1973). Here, the government is on a classic fishing expe-

dition—one which its own statistics suggest will result in a meagre catch.[28]

Administrative Summonses—Even if regarded as analogous to an administrative summons, the reporting requirements of the Bank Secrecy Act violate the Fourth Amendment.

Consider, for example, the use and enforcement of administrative summonses issued by the Internal Revenue Service.[29] If the summons is directed to the taxpayer and he refuses to comply, certain standards must be met before the District Court can order enforcement. Writing for the majority in *United States v. Powell*, 379 U.S. 48 (1964), Mr. Justice Harlan ruled that while the Commissioner of Internal Revenue need not show probable cause, he must demonstrate:

> "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed." *Id.* at 57-58.[30]

Here, there is *no* opportunity to challenge the Act's reporting requirements. Whereas enforcement of an IRS summons can only come "by federal court authority in 'an adversary proceeding' affording the opportunity for challenge and 'complete protection to the witness,' "[31] the duty

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28. We are told by the government that of the 40,000 currency transaction reports generated by the Trading With the Enemy Act in 1958 and 1959, *less than .3%* (129 out of 40,000) led to "completed" tax cases— whatever that means. (Govt. Brief 36 n. 21, 38.)

29. See, Act of August 16, 1954, c. 736, 68A Stat. 901 (26 U.S.C. § 7602).

30. The *Powell* case involved a summons directed to the president of a corporate taxpayer, and in a companion case involving an individual taxpayer, this Court set forth the same enforcement standards. See *Ryan v. United States*, 379 U.S. 61 (1964).

31. *Donaldson v. United States*, 400 U.S. 517, 525 (1971).

to report imposed by the Bank Secrecy Act is immediate and automatic. Failure to report is a crime. (Section 209). Since the Act excludes judicial consideration, there is no opportunity for challenge or intervention—by anyone.

Required Reports—Finally, even if the reports required by the Bank Secrecy Act are deemed analogous to the required reports approved in such cases as *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), and *Yakus v. United States*, 321 U.S. 414 (1944) the Act is invalid.

Congress may, of course, require private citizens and business entities to keep records and make reports. *United States v. Morton Salt Co., supra,* at 647-651. But those records and reports must be reasonably related to a *specific* purpose. *Shapiro v. United States,* 335 U.S. 1, 32 (1948); *Yakus v. United States,* 321 U.S. 414, 424 (1944); *United States v. Darby,* 312 U.S. 100, 125 (1941). In *Morton Salt,* for example, the required reports were in aid of a cease and desist order issued by the Federal Trade Commission. In the *Shapiro* and *Yakus* cases, the required reports were essential to the enforcement of a wartime price control act. The reports approved in *Darby* were required in the enforcement of a Federal wages and hours law.

Second, this Court has consistently confined compulsory reporting to that required to monitor either (1) the reporting entity, or (2) the reporting entity's business. Legislation requiring gamblers to report income or employees to report wages and hours is primarily aimed at monitoring the reporting entity. See, e.g., and respectively, *Marchetti v. United States,* 390 U.S. 39 (1968) and *United States v. Darby,* 312 U.S. 100 (1941). Legislation requiring firearms dealers or drug manufacturers to maintain sales records is designed to monitor the marketing of their respective wares. See, e.g., and respectively, 18 U.S.C. § 923(g) and

21 U.S.C. § 827(b).[32] The latter are designed to monitor both the recordkeeper and the buyer. See generally, *United States v. Miller*, 426 F.2d 794 (4th Cir. 1970). Here, the reports required by the Bank Secrecy Act have *nothing* to do with the regulation of banks or other financial institutions. There is no suggestion in the Act's legislative history, and there can be no suggestion in this litigation, that the Bank Secrecy Act is required or even involved in the regulation of America's financial industry.

Finally, and perhaps most important, the reports required by the Bank Secrecy Act undermine the "required records" standards set forth in *Shapiro v. United States*, 335 U.S. 1 (1948); *Marchetti v. United States*, 390 U.S. 39 (1968); and *Grosso v. United States*, 390 U.S. 62 (1968).

To be used in a criminal prosecution of the reporting party, the foregoing cases require, first, that the records and reports be ones that would "customarily" be kept; second, they must have some specific "public aspect"; and third, they must have arisen out of an "essentially noncriminal and regulatory area of inquiry." *Marchetti v. United States*, 390 U.S. 39, 57 (1968)[33]. In other words, the government cannot use required records against the recordkeeper in a criminal prosecution unless they would (1) ordinarily be kept in any event; (2) serve some specific public, as opposed to private, purpose; and (3) arise in a civil context.

The foregoing limitations are designed, of course, to protect the defendant from compulsory self-incrimination, and *Shapiro, et al.*, are Fifth Amendment cases. But the

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32. Act of October 22, 1968, Title I, § 102, 82 Stat. 1222 and Act of October 27, 1970, Title II, § 307, 84 Stat. 1258.

33. See, McKay, *Self-Incrimination and the New Privacy*, 1967, Sup. Ct. Rev. 193, 214-217; and Note, *Required Information and the Privilege Against Self-Incrimination*, 65 Colum. L. Rev. 681 (1965).

interest to be protected here (freedom from unreasonable search and seizure) is at least as strong as the interest at issue in *Shapiro, et al.,* (freedom from compulsory self-incrimination), and the foregoing safeguards are clearly applicable. The reports in question and the information on which they are based are *not* ordinarily kept by financial institutions.[34] While they arguably serve a public purpose, the reports required by the Act do not arise in a civil context. The Bank Secrecy Act, the government reminds, is designed "to reduce white-collar crime." (Govt. Brief 3).

The safeguards outlined in *Shapiro, et al.,* are applicable regardless of whether the reports required by the Act are based on the banks' own records or the records of their customers.

Even if one were to accept the government's erroneous contention[35] that the required reports are based on "the banks' own records" (Govt. Brief 33), then the banks are entitled to the usual Fourth Amendment protection afforded papers and effects (i.e., a warrant, subpoena or summons), and at least some opportunity to challenge the search. The Bank Secrecy Act simply by-passes the foregoing safeguards, and gives the Treasury Secretary authority to *compel* a detailed disclosure of whatever currency transactions he decides have "a high degree of usefulness in criminal, tax and regulatory investigations or proceedings." (Section 121).

If, on the other hand, the reports are based on information supplied by bank customers, then the Act's reporting requirements destroy the *customers'* Fourth Amendment safeguards by providing reports on the customers' financial affairs without a warrant, summons, or opportunity for judicial challenge and review.

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34. See discussion, *infra,* at 28-29.

35. See discussion, *infra,* at 28-31.

In summary, if the required reports are based on records that "belong" to the banks, then the banks are entitled to Fourth Amendment protection. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946). If the required reports are based on records that "belong" to the banks' customers, then those customers have a right to the protection of the Fourth Amendment.

Summary—Common to the criminal and administrative Fourth Amendment cases decided by this Court is the view that the government must obtain a search warrant whenever possible. The exceptions, in turn, have been limited to specific persons under specific circumstances.

The search authorized by the Bank Secrecy Act destroys the foregoing limitations.

By simply declaring an entire class of financial transactions highly useful "in criminal, tax, and regulatory investigations and proceedings," and then requiring reports of their occurrence, the government ignores the balance this Court has attempted to maintain between the government's need to know and the right of the citizenry to be secure in their papers and effects. The reporting requirements of the Bank Secrecy Act simply do away with what Mr. Justice Jackson once described as the on-going work of the Court.

> "The Court's day-to-day task is to reject as false, claims in the name of civil liberty which, if granted, would paralyze or impair authority to defend existence of our society, and to reject as false, claims in the name of security which would undermine our freedoms and open the way to oppression. These are the competing considerations involved in judging any measures which government may take to suppress or disadvantage its opponents and critics." *American Communications Ass'n. v. Douds*, 339 U.S. 382, 445 (1950).

If Congress can simply declare certain events (e.g., telephone conversations) useful "in criminal, tax and regula-

tory investigations and proceedings," and then require detailed reports on their occurrence, the work of this Court in maintaining the balance between liberty and authority would soon come to an end.

2. Regardless of Whether They Are Based on the Banks' Own Records or the Records of Their Customers, the Reports Required by the Bank Secrecy Act Violate the Fourth Amendment.

In an effort to salvage the Bank Secrecy Act's reporting requirements, the government argues that since the reports required by the Act are based on "the bank's own records, no seizure of any tangible or intangible property of the bank customer is involved." (Govt. Brief 33). The argument seems to be that since that Act's reporting requirements are aimed at bank customers, the Fourth Amendment limitations on search and seizure do not apply. (Govt. Brief 31).

With all due respect, the government's argument is irrelevant, and fails for at least two separate reasons.

First, the reports required by the Act are *not* based "on the bank's own records." They are based on information provided banks by their customers, including (1) the name, address, business or profession and social security number of the person conducting the transaction; (2) similar information as to the person or organization for whom it was conducted; (3) a summary description of the "nature" of the transaction, the type, amount and denomination of the currency involved and a description of any check involved in the transaction; (4) the type of identification presented by the customer, and (5) the identity of the reporting institution.[36] Virtually *none* of the foregoing information is re-

36. See Department of the Treasury Form 4789, included with the government's Jurisdictional Statement at App. 121; see Govt. Brief 14-15; and see 31 C.F.R. § 103.22, requiring banks to list and, at the request of the Secretary to report those bank customers the bank concludes are exempt from the currency transaction reports.

quired by a bank to conduct a currency transaction. It is common knowledge that currency may be deposited in a bank account by simply filling-out a deposit slip, setting forth the amount involved, the date, and the name or other identification of the account. Similarly, a bank customer may withdraw currency from an account over which he has signature authority by simply signing and filling-out a withdrawal slip and setting forth the amount, date, and identity of the account. Banks have no need whatever for the "business or profession" of the depositor; no need whatever for the identity of the "person or organization for whom the transaction was conducted" and no interest whatever in the "nature" of the transaction.

The reports required by the Act are really based on information and instructions provided banks by their customers. Most of the time, the instructions are in writing in the form of deposit or withdrawal slips. Sometimes the instructions and information are provided in person, other times they are delivered by mail. In any case, deposit and withdrawal slips are essentially messages from a bank customer to his bank. They no more "belong" to the bank than instructions to a telephone operator "belong" to the telephone company. A currency transaction is, of course, normally reflected for a time by a bank's records, just as long distance telephone calls are reflected for a time by telephone company records. There is no essential difference between instructions given to a telephone company by dialing a number, and instructions given to a bank in the form of a deposit slip.

Second, even if we assume that the reports required by the Act were based on bank records, *then the Fourth Amendment operates in favor of the bank. Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946). The government's argument that since the reports are based on *bank* records, the Fourth Amendment does not apply (Govt. Brief 33) is

—with all due respect—an affront to common sense. It would mean, for example, that the papers and effects of a citizen containing information about another citizen could be seized and searched without a warrant, summons, or official justification. The government's argument would mean, for example, that the government could search and seize bank, telephone company or public utility records at will.

The fallacy inherent in the government's argument can be seen another way. The reporting requirements of the Act operate without judicial supervision or review. As such, the Act destroys the protection and control relied on by this Court in such cases as *Reisman v. Caplin,* 375 U.S. 440 (1964) and *Donaldson v. United States,* 400 U.S. 517 (1970). In *Donaldson,* for example, the Internal Revenue Service had issued an administrative summons for various writings and documents pertaining to a taxpayer, *but owned by the respondent. Id.* at 522-523. The taxpayer moved to intervene. The motion was denied. But implicit in the motion to intervene and in the discussions in each of the foregoing cases is the fact that enforcement of the summons could only come "by federal court authority in an 'adversary proceeding' affording the opportunity for challenge and 'complete protection to the witness.'" *Id.* at 525. The Bank Secrecy Act affords no such protection. The duty to report is immediate and automatic. (31 C.F.R. §§ 103.22 and 103.25). The requirements of the Bank Secrecy Act afford *no* opportunity for challenge or intervention by anyone.

—There is simply no legal or material difference between a statute requiring banks to report certain financial transactions, and a statute requiring telephone companies to report all telephone calls made to persons in a particular classification—e.g., ghetto residents, Sicilian immigrants, gambling casino employees, etc.

—There is no real difference between the reporting compelled by the Bank Secrecy Act and a law requiring reports from retail merchants on all purchases found by an administrator to have "a high degree of usefulness in criminal tax and regulatory investigations and proceedings."

—There is simply no legal or material distinction between the reporting requirements of the Bank Secrecy Act and a statute authorizing reports from the postal service on mail received by persons or classes of persons found by an administrator to be highly useful "in criminal, tax, and regulatory investigations and proceedings."

—There is simply no legal or material difference between a statute requiring banks to report, promptly and automatically, certain $10,000 currency transactions, and legislation requiring landlords to monitor and report on tenants who stay out late, subscribe to detective magazines, or act tough.

The hypothetical legislation described above might well have "a high degree of usefulness in criminal, tax and regulatory investigations and proceedings." But like the statute now before this Court, it would destroy the Fourth Amendment balance this Court has established between the government's need to know and a citizen's right to be secure in his papers and effects.

3. Since the Bank Secrecy Act Violates the Constitution, the Existence of Cautious Regulations Is Irrelevant.

In what amounts to its main defense of the Bank Secrecy Act's reporting requirements, the government argues that the regulation now in effect, requiring reports of certain $10,000 currency transactions, "is not unduly broad, but is narrowly directed to the category of transactions that is most likely to be indicative of questionable activity." (Govt. Brief 39). The government asks the Court to avoid the "hypothetical application of the statute feared by plaintiffs and the district court . . ." (Govt. Brief 28).

The government's argument simply ignores the familiar principle that narrow application will not salvage an invalid statute. *Agnello v. United States*, 269 U.S. 20, 33 (1925); *Katz v. United States*, 389 U.S. 347, 356-357 (1967); *United States v. United States District Court*, 407 U.S. 297, 317 (1972). In *Katz*, for example, the government argued, as it does now, that since its agents "did no more . . . than they might properly have done with prior judicial sanction, [the Court] should retroactively validate their conduct." *Katz v. United States*, *supra* at 356.

> "That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." *Id.* at 356-357.

In *United States v. United States District Court*, 407 U.S. 297 (1972), the Court recognized that the wiretap in question might well have been reasonable and "one which readily would have gained prior judicial approval." *Id.* at 317. But the Court then quoted the foregoing language in *Katz* and said:

> "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be

reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government." *Id.* at 317 (Footnote and citation omitted).

In summary, even if one assumed a high correlation between $10,000 currency transactions and the commission of a crime, the Fourth Amendment requires adherence to judicial process. *United States v. Jeffers*, 342 U.S. 48, 51 (1951). The requirements of the Fourth Amendment cannot be abridged in the name of effective law enforcement. *Berger v. New York*, 388 U.S. 41, 60-62 (1967).

We have reached a time where it is technically feasible to monitor and record what every citizen is doing all the time.[37] The question then, now more than ever before, is simply this: what kind of surveillance will the dictates of the Fourth Amendment tolerate? Where, as here, there is no opportunity whatever for judicial supervision or review, the statute clearly destroys the force and effect of the Fourth Amendment.

4. The District Court's Interpretation of the Bank Secrecy Act's Reporting Requirements Is More Than Justified.

The government argues that the District Court's interpretation of the Bank Secrecy Act's reporting requirements is "unnecessarily broad" and that the Act cannot be used by the Treasury Secretary to demand "detailed reports of all domestic financial transactions, including copies of personal checks." (Govt. Brief 25).

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37. See generally, Westin & Baker, *Data Banks in a Free Society* (1972), and U.S. Department of Health, Education & Welfare, *Records, Computers and the Rights of Citizens: Report of the Secretary's Advisory Committee on Automated Personal Data Systems* (1973).

The basic question, however, is whether under *any* interpretation the Act and regulations are valid. As we have attempted to make clear, the reporting requirements of the Act plainly violate the Fourth Amendment safeguards established by this Court, regardless of the circumstance.

Responding, nonetheless, to the government's criticism of the District Court's opinion, we note, first, that the reports required by the Act *do* entail personal checks. The report form (Department of the Treasury Form 4789) requires banks to provide, in the government's own words, "a summary description of the nature of the transaction, the type, amount and denomination of the currency involved *and a description of any check involved in the transaction.*" (Govt. Brief 15). (Emphasis added). The Act leaves the definition of a proscribed "transaction" to the Secretary (Section 221), and as noted above, the reports in question require a wide range of information unrelated to the deposit or withdrawal of currency to or from a bank account.[38]

Second, the criteria for required reports belies a narrow construction. Section 202 authorizes reports having "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." The government argues that the resulting reporting requirements have been "narrowly" drawn. (Govt. Brief 39). Yet the *same* standard ("high degree of usefulness in criminal, tax . . ." etc.) has been used by the Secretary to require banks and others to copy and retain virtually every piece of paper that passes through America's domestic banking system. (Section 101(b); 31 C.F.R. §§ 103.31, 103.33; and see CBA Brief 20-25). The standard for required reports (Section 202) and required records (Section 101(b)) is identical. The only real limitation on the number and nature of reports that may be

38. See discussion, *infra* at 28-29.

required by the Act is the ability of the Treasury Department to assimilate and disseminate reported information. The *real* reason the Treasury Secretary currently limits required reports to $10,000 currency transactions was suggested by former Commissioner of Internal Revenue, Randolph W. Thrower.

> "Theoretically, the retention of extensive records of banking transactions would meet our needs. Realistically, however, the creation of a mass of paper beyond our capacity to digest and utilize could have the effect of submerging and making unobtainable information of special interest to us. In other words, a rifle rather than a shotgun may represent the best approach to the problem". *Hearings on H.R. 15073 Before the House Committee on Banking and Currency,* 91st Cong., 1st and 2nd Sess., 68 (1970).

5. Since There Is No Way to Be Certain a Proscribed Transaction Has Occurred, the Bank Secrecy Act Fails to Give Adequate Notice in Violation of Due Process.

Section 221 provides that transactions involving "the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify" are to be "reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require."

In turn, Section 103.22 of the regulations provides in part:

> "Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.
>
> Except as otherwise directed in writing by the Secretary, this section shall not . . . (3) require a bank to report transactions with an established customer

> maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him." 31 C.F.R. § 103.22.

Section 103.22 of the regulations imposes the duty to report on banks, and Sections 209 and 210 subject the latter to criminal penalties for willful violation. The regulation, however, is singularly vague and would appear to be in violation of the familiar due process requirement of adequate notice. See, e.g., *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *Jordan v. DeGeorge*, 341 U.S. 223, 230 (1951, *rehearing denied*, 341 U.S. 956 (1951); *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

The requirement of adequate notice was explained in *Connally v. General Const. Co., supra*, as follows:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Id.* at 391.

Here, 31 C.F.R. § 103.22 requires banks to determine whether a given currency transaction exceeds "amounts

commensurate with the customary conduct of the [customer's] business, industry or profession." The regulation has a twin vice: while its usefulness to the government is largely dependent on the judgment, prejudice and experience of financial institution employees, the penalties for error are severe, cumulative and certain. The regulations take no account of—and in fact can be read as specifically aimed at—organizations and committees that often obtain large amounts of currency at rallies and meetings. The fact that a failure to report must be willful (Section 209) is little comfort. "Willful" has been called a word "of many meanings, its construction often being influenced by its context." *Spies v. United States*, 317 U.S. 492, 497 (1943). When used in a criminal context, "it generally means an act done with a bad purpose." *United States v. Murdock*, 290 U.S. 389, 394 (1933). In the case of 31 C.F.R. § 103.22, "bad purpose" may simply be a decision by an employee of a financial institution not to report a currency transaction.

6. The Bank Secrecy Act Regulation Requiring Reports of Certain $10,000 Currency Transactions (31 C.F.R. § 103.22) Expressly Violates a Requirement of the Act.

Quite apart from constitutional infirmities, Section 103.22 of the regulations clearly violates a modest notice requirement of the Act.

Section 222 of the Act provides:

> "The report of any transaction required to be reported under this chapter shall be signed or otherwise made *both* by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require." (Emphasis added).

In the case of domestic currency transactions, however, the implementing regulation simply requires a report by the financial institution involved—not by the customer and party to the transaction.[39] 31 C.F.R. § 103.22 simply requires in pertinent part that "[e]ach *financial institution* shall file a report of each deposit, withdrawal, exchange of currency or other payment . . . which involves a transaction in currency of more than $10,000." (Emphasis added).

The government would, of course, receive a report from the financial institution in any event. But 31 C.F.R. § 103.22 means the customer will have no way of knowing that a report was made.

This omission is in direct conflict with the intent of Congress, as explained in the Report of the House Banking and Currency Committee on Section 222 of the Act.

> "The bill requires that reports be filed *both* by the financial institution involved and by one or more of the other parties to or participants in the transaction, as the Secretary may require. The purpose of this is twofold. First, it permits the prosecution of a person who supplies false information for such a report and signs it. Secondly, *it relieves the institution of any pressure the Secretary of the Treasury might otherwise be inclined to exert to require it to submit reports of this type without notifying the customer.* The latter procedure raises serious questions in respect to the fiduciary duty of financial institutions to their customers, not to mention the right of privacy or simply fairness."[40] (Emphasis added).

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39. In the case of monetary *exports*, however, 31 C.F.R. § 103.23 requires a report from the person involved, including those situations where the person "aids, abets, counsels, commands, procures, or requests it to be done by a financial institution or any other person."

40. 2 U.S. Code Cong. and Admin. News, 4394, 4407 (91st Cong. 2nd Sess. 1970). Both H.R. 15073 and S. 3678 were considered by the Committee, and they contain identical versions of what became Section 222 of the Bank Secrecy Act.

By failing to adopt a regulation in accord with the requirements of Section 222, the Treasury Secretary has ignored the intent of Congress and raised "serious questions in respect to the fiduciary duty of financial institutions to their customers, not to mention the right of privacy or simply fairness."

Section 10(e) of the Administrative Procedure Act provides in part that "the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . (3) in excess of statutory jurisdiction, authority limitations, or short of statutory right."[41] It would appear to follow, then, that 31 C.F.R. § 103.22 is invalid, quite apart from constitutional objections. See also, *Kent v. Dulles*, 357 U.S. 116, 129-130 (1958); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-589 (1952); and *Ex parte Mitsuye Endo*, 323 U.S. 283, 299 (1944).

7. Since the Bank Secrecy Act's Required Recordkeeping and Reports Are Inexorably Tied, They Are Invalid for the Same Reasons.

In our brief on appeal, we attempted to show that the Bank Secrecy Act's recordkeeping requirements were the handmaiden of the Act's domestic reporting provisions. (See CBA Brief 37-39). We respectfully refer the Court to that discussion here.

The extent to which the Act's recordkeeping and reporting requirements are mutually dependent was recently recognized again by the government.

> "Moreover, the utility of the reporting provisions becomes even more apparent when they are viewed in context as a part of the entire Bank Secrecy Act. Title I requires financial institutions to maintain records so that they will be available for subpoena or summons

41. Act of June 11, 1946, c. 324, § 10(e), 60 Stat. 243 (5 U.S.C. § 706)

> by law enforcement officials. But the effectiveness of these provisions, which the district court upheld . . . depends on whether those engaging in illegal activities use written instruments such as checks and on whether the investigatory agencies know of the financial institutions with which they deal. Reports by financial institutions of large currency transactions by nonestablished customers prevent underworld figures from evading the effect of the Title I recordkeeping provisions and supply leads for determining which records should be summoned or subpoenaed." (Govt. Brief 39-40).

For the reasons set forth in our brief on appeal (CBA Brief 15-40), we believe the Bank Secrecy Act's recordkeeping requirements to be plainly unconstitutional. As the handmaiden of the recordkeeping provisions, the Act's reporting requirements are invalid for the same reasons.

8. The California Bankers Association Has Standing to Assert the Constitutional Rights of Its Members and Their Customers.

The government argues, as it has before,[42] that the California Bankers Association has no standing to assert the constitutional rights of its members' customers. (Govt. Brief 22-23).

In reply we note, first, that "an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972). The basic question is said to be whether the party has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . ." *Baker v. Carr,* 369 U.S. 186, 204 (1962).

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42. See, e.g., *Motion to Affirm,* filed by the government in Nos. 72-985 and 72-1196, at 9, 23.

Here, the government is in a curious position. The government argues that the members of the California Bankers Association "failed to show that they have sustained or are in imminent danger of sustaining any direct injury as a result of the actual operation of the Act." (Govt. Brief 23). At the same time, the government argues that the reports required by the Act are based on "the bank's own records." (Govt. Brief 31 and 33). According to the government then, the Act requires the wholesale disclosure of records *owned* by the bank, and no opportunity to assert any rights of ownership, including specifically, freedom from unreasonable search and seizure. The Bank Secrecy Act, according to the government, offers a paradox in which banks are obliged to reveal the contents of their records with no standing to challenge disclosure for any reason on any ground.

Second, the government's reliance on *Broadrick v. Oklahoma*, —— U.S. ——, 93 S. Ct. 2908 (1973) appears misplaced.[43] The Court recognized in *Broadrick* that "where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves," the standing principles set forth in the case may be excepted. *Id.* at 2915.

The foregoing exception applies here.

The reporting requirements of the Bank Secrecy Act require *banks* to report the details of their customers' currency transactions. (Section 222, 31 C.F.R. § 103.22). The customer is given no opportunity to resist disclosure — and in fact no notice that a report will be made to the government.[44] The banks' duty to report is immediate and automatic. (31 C.F.R. §§ 103.22, 103.25). The banks' customers

43. See, Govt. Brief 22-23.

44. See discussion, *supra* at 37-39.

have "no effective avenue of preserving their rights themselves."

Bank customers are in a position analogous to the absent parties in *NAACP v. Alabama*, 357 U.S. 449 (1958), where the Court held that the NAACP could assert the rights of its members, and said:

> "The principle [requiring standing] is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court." *Id.* at 459.

Here, since the Act affords no opportunity to contest disclosure in a judicial forum; since banks rather than their customers have the duty to report; and since the duty to report is immediate and automatic, this case provides the only viable test available.

It is clearly unreasonable to expect a depositor to seek declaratory relief[45] just prior to engaging in a $10,000 currency transaction, just as few if any depositors would be willing to pursue declaratory relief in anticipation of future currency transactions.

The member banks of the California Bankers Association, however, have a direct and continuing interest in preserving a confidential relationship with their customers—a "personal stake in the outcome of the controversy." *Baker v. Carr, supra* at 204.

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45. See, Act of May 24, 1949, c. 139, § 111, 63 Stat. 105 (28 U.S.C. § 2201).

CONCLUSION

For the reasons stated here, and for the reasons stated in our brief on appeal, it is respectfully submitted that (1) the order of the District Court enjoining enforcement and operation of Sections 221, 222 and 223 of the Bank Secrecy Act be *affirmed;* and that (2) the order of the District Court denying the California Bankers Association's motion for a preliminary injunction, restraining the enforcement and operation of Title I and implementing regulations of the Act, should be *reversed.*

December 21, 1973

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Appendix A

The Constitution of the United States of America

Amendments

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix B

Act of October 26, 1970, P.L. 91-508, 84 Stat. 1114

TITLE I—FINANCIAL RECORDKEEPING

Chapter 1.

Insured Banks and Insured Institutions

§ 101. Retention of Records by Insured Banks—Congressional Findings and Declaration of Purpose

(a)(1) The Congress finds that adequate records maintained by insured banks have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that microfilm or other reproductions and other records made by banks of checks, as well as records kept by banks of the identity of persons maintaining or authorized to act with respect to accounts therein, have been of particular value in this respect.

(2) It is the purpose of this section to require the maintenance of appropriate types of records by insured banks in the United States where such records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

(b) Where the Secretary of the Treasury (referred to in this section as the "Secretary") determines that the maintenance of appropriate types of records and other evidence by insured banks has a high degree of usefulness

in criminal, tax, or regulatory investigations or proceedings, he shall prescribe regulations to carry out the purposes of this section.

(c) Each insured bank shall maintain such records and other evidence, in such form as the Secretary shall require, of the identity of each person having an account in the United States with the bank and of each individual authorized to sign checks, make withdrawals, or otherwise act with respect to any such account. The Secretary may make such exemptions from any requirement otherwise imposed under this subsection as are consistent with the purposes of this section.

(d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—

(1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and

(2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

(e) Whenever any individual engages (whether as principal, agent, or bailee) in any transaction with an insured bank which is required to be reported or recorded under the Currency and Foreign Transactions Reporting Act, the bank shall require and retain such evidence of the identity of that individual as the Secretary may prescribe as appropriate under the circumstances.

(f) In addition to or in lieu of the records and evidence otherwise referred to in this section, each insured bank

shall maintain such records and evidence as the Secretary may prescribe to carry out the purposes of this section.

(g) Any type of record or evidence required under this section shall be retained for such period as the Secretary may prescribe for the type in question. Any period so prescribed shall not exceed six years unless the Secretary determines, having regard for the purposes of this section, that a longer period is necessary in the case of a particular type of record or evidence.

(h) The Secretary shall include in his annual report to the Congress information on his implementation of the authority conferred by this section and any similar authority with respect to recordkeeping or reporting requirements conferred by other provisions of law.

§ 102. Retention of Records by Insured Institution

The Secretary of the Treasury shall prescribe such regulations as may be appropriate to carry out, with respect to insured institutions, the purposes set forth in Section 21 of the Federal Deposit Insurance Act with respect to insured banks."

Chapter 2.
Other Financial Institutions

§ 121. Congressional Findings and Declaration of Purpose

(a) The Congress finds that certain records maintained by businesses engaged in the functions described in section 123(b) of this Act have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings. The Congress further finds that the power to require reports of changes in the ownership, control, and managements of types of financial institutions referred to in section 122 of this Act may be necessary for the same purpose.

(b) It is the purpose of this chapter to require the maintenance of appropriate types of records and the making of appropriate reports by such businesses in the United States where such records or reports have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 122. Reports on Ownership and Control

Where the Secretary determines that the making of appropriate reports by uninsured banks or uninsured institutions of any type with respect to their ownership, control, and managements and any changes therein has a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such banks or institutions to make such reports as he determines in respect of such ownership, control, and managements and changes therein.

§ 123. Recordkeeping and Procedures

(a) Where the Secretary determines that the maintenance of appropriate records and procedures by any uninsured bank or uninsured institution, or any person engaging in the business of carrying on in the United States any of the functions referred to in subsection (b) of this section, has a high degre of usefulness in criminal, tax, or regulatory investigations or proceedings, he may by regulation require such bank, institution, or person—

(1) to require, retain, or maintain, with respect to its functions as an uninsured bank or uninsured institution or its functions referred to in subsection (b) any records or evidence of any type which the Secretary is authorized under section 21b of the Federal

Deposit Insurance Act to require insured banks to require, retain, or maintain; and

(2) to maintain procedures to assure compliance with requirements imposed under this chapter. For the purposes of any civil or criminal penalty, a separate violation of any requirement under this paragraph occurs with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

(b) The authority of the Secretary under this section extends to any person engaging in the business of carrying on any of the following functions:

(1) Issuing or redeeming checks, money orders, travelers' checks, or similar instruments, except as an incident to the conduct of its own nonfinancial business.

(2) Transferring funds or credits domestically or internationally.

(3) Operating a currency exchange or otherwise dealing in foreign currencies or credits.

(4) Operating a credit card system.

(5) Performing such similar, related, or substitute functions for any of the foregoing or for banking as may be specified by the Secretary in regulations.

§ 124. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation under this chapter, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or

temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with any regulation of the Secretary under this chapter.

§ 125. Civil Penalties

(a) For each willful violation of any regulation under this chapter, the Secretary may assess upon any person to which the regulation applies, and, if such person is a partnership, corporation, or other entity, upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this section, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

§ 126. Criminal Penalty

Whoever willfully violates any regulation under this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

§ 127. Additional Criminal Penalty in Certain Cases

Whoever willfully violates any regulation under this chapter, section 21b of the Federal Deposit Insurance Act, or section 411 of the National Housing Act where the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 128. Compliance

The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

§ 129. Administrative Procedure

The administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of Title 5 shall apply to all proceedings under this chapter, section 21b of the Federal Deposit Insurance Act, and section 411 of the National Housing Act.

TITLE II—REPORTS OF CURRENCY AND FOREIGN TRANSACTIONS

Chapter 1.
General Provisions

§ 201. Short Title

This title may be cited as the "Currency and Foreign Transactions Reporting Act".

§ 202. Congressional Declaration of Purpose

It is the purpose of this title to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 203. Definitions and Rules of Construction

(a) The definitions and rules of construction set forth in this section apply for the purposes of this title.

(b) The term "Secretary" means the Secretary of the Treasury.

(c) The term "person" includes natural persons, partnerships, trusts, estates, associations, corporations, and all entities cognizable as legal personalities. The term also includes any governmental department or agency specified by the Secretary either for the purpose of this title generally or any particular requirement thereunder.

(d) The term "United States", used in a geographical sense, includes the States and the District of Columbia, and to the extent the Secretary shall by regulation specify, either for the purposes of this chapter generally or any particular requirement thereunder, the Commonwealth of Puerto Rico, the possessions of the United States, United States military establishments, and United States diplomatic establishments.

(e) The term "financial institution" means any person which does business in any one or more of the following capacities:

(1) an insured bank as defined in section 3 of the Federal Deposit Insurance Act;

(2) a commercial bank or trust company;

(3) a private banker;

(4) an agency or a branch within the United States of any foreign bank;

(5) an insured institution as defined in section 401 of the National Housing Act;

(6) a savings bank, building and loan association, credit union, industrial bank, or other thrift institution;

(7) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934;

(8) a broker or dealer in securities or commodities;

(9) an investment banker or investment company;

(10) a currency exchange;

(11) an issuer, redeemer or cashier of travelers' checks, checks, money orders, or similar instruments;

(12) an operator of a credit card system;

(13) an insurance company;
(14) a dealer in precious metals, stones, or jewels;
(15) a pawnbroker;
(16) a loan or finance company;
(17) a travel agency;
(18) a licensed transmitter of funds;
(19) a telegraph company;
(20) a Federal, State, or local government institution which performs any of the functions of any of the businesses listed above; or
(21) any other type of business or institution performing similar, related, or substitute functions specified by the Secretary by regulation for the purposes of the provision of this title to which the regulation relates.

(f) The term "domestic", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

(g) The term "financial agency" means any person which acts in the capacity of a financial institution or in the capacity of a bailee, depository trustee, agent, or in any other similar capacity with respect to money, credit, securities, or gold or transactions therein, on behalf of any person other than a government, a monetary or financial authority when acting as such, or an international financial institution of which the United States is a member.

(h) The term "foreign", used with reference to institutions or agencies, limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions outside the United States.

(i) References to this title or any provision thereof include regulations issued under this chapter or the provision thereof in question.

(j) All reports required under this chapter and all records of any such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

(k) For the purposes of section 1001 of Title 18, United States Code, the contents of reports required under any provision of this chapter are statements and representations in matters within the jurisdiction of an agency of the United States.

(l) The term "monetary instruments" means coin and currency of the United States, and in addition, such foreign coin and currencies, and such types of travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, and stock with title passing upon delivery, or the equivalent thereof, as the Secretary may by regulation specify for the purposes of the provision of this title to which the regulation relates.

§ 204. Regulations

The Secretary shall prescribe such regulations as he may deem appropriate to carry out the purposes of this title.

§ 205. Compliance

(a) The Secretary shall have the responsibility to assure compliance with the requirements of this title and may delegate such responsibility to the appropriate bank supervisory agency, or other supervisory agency.

(b) The Secretary may by regulation require any class of domestic financial institutions to maintain such procedures as he may deem appropriate to assure compliance with the provisions of this title. For the purposes of both civil and criminal penalties for violations of this section, a separate violation shall be deemed to occur with respect to each day and each separate office, branch, or place of business in which the violation occurs or continues.

§ 206. Exemptions

The Secretary may make such exemptions from any requirement otherwise imposed under this title as he may deem appropriate. Any such exemption may be conditional or unconditional, by regulation, order, or licensing, or any combination thereof, and may relate to any particular transaction, to the type or amount of the transaction, to the party or parties or the classification of parties, or to any combination thereof. The Secretary may in his discretion, in any manner giving actual or constructive notice to the parties affected, revoke any exemption made under this section. Any such revocation shall remain in effect pending any judicial review.

§ 207. Civil Penalty

(a) For each willful violation of this title, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer, or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) In the event of the failure of any person to pay any penalty assessed under this title, a civil action for the recovery thereof may, in the discretion of the Secretary, be brought in the name of the United States.

§ 208. Injunctions

Whenever it appears to the Secretary that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of the provisions of this title, or of any order thereunder, he may in his discretion bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United

States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the Secretary, any such court may also issue mandatory injunctions commanding any person to comply with the provisions of this title or any order of the Secretary made in pursuance thereof.

§ 209. Criminal Penalty

Whoever willfully violates any provision of this title or any regulation under this title shall be fined not more than $1,000, or imprisoned not more than one year, or both.

§ 210. Additional Criminal Penalty in Certain Cases

Whoever willfully violates any provision of this title where the violation is—

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period,

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

§ 211. Immunity of Witnesses

Whenever a witness refuses on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding involving any violation of this title before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order requiring him to give testimony or provide other information, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination. No such testimony or other information so compelled under the order or evidence or other information which is obtained by the exploitation of such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

§ 212. Availability of Information to Other Federal Agencies

The Secretary shall, upon such conditions and pursuant to such procedures as he may be regulation prescribe, make any information set forth in reports filed pursuant to this title available for a purpose consistent with the provisions of this chapter to any other department or agency of the Federal Government on the request of the head of such department or agency.

§ 213. Administrative Procedure

Subject to section 203(j) the administrative procedure and judicial review provisions of subchapter II of chapter 5 and chapter 7 of title 4, United States Code, shall apply to all proceedings under this title.

Chapter 2.
Domestic Currency Transactions

§ 221. Reports

Transactions involving any domestic financial institution shall be reported to the Secretary at such time, in such manner, and in such detail as the Secretary may require

if they involve the payment, receipt, or transfer of United States currency, or such other monetary instruments as the Secretary may specify, in such amounts, denominations, or both, or under such circumstances, as the Secretary shall by regulation prescribe.

§ 222. Persons Required to File Reports

The report of any transaction required to be reported under this chapter shall be signed or otherwise made both by the domestic financial institution involved and by one or more of the other parties thereto or participants therein, as the Secretary may require. If any party to or participant in the transaction is not an individual acting only for himself, the report shall identify the person or persons on whose behalf the transaction is entered into, and shall be made by the individuals acting as agents or bailees with respect thereto.

§ 223. Reporting Procedure

(a) The Secretary may in his discretion designate domestic financial institutions, individually or by class, as agents of the United States to receive reports required under this chapter, except that an institution which is not insured, chartered, examined, or registered as such by any agency of the United States may not be so designated without its consent. The Secretary may suspend or revoke any such designation for any violation of this Act, or section 21 of the Federal Deposit Insurance Act, or section 411 of the National Housing Act.

(b) Any person (other than an institution designated under subsection (a)) required to file a report under this chapter with respect to a transaction with a domestic financial institution shall file the report with that institution,

except that (1) if the institution is not designated under subsection (a), the report shall be filed as the Secretary shall prescribe, and (2) any such person may, at his election and in lieu of filing the report in the manner hereinabove prescribed, file the report with the Secretary. Domestic financial institutions designated under subsection (a) shall transmit reports filed with them, and shall file their own reports, as the Secretary shall prescribe.

Chapter 3.

Reports of Exports and Imports of Monetary Instruments

§ 231. Reports—Persons Required to File

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

(A) from any place within the United States to or through any place outside the United States, or

(B) to any place within the United States from or through any place outside the United States, or

(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

(b) Reports required under this section shall be filed at such times and places, and may contain such of the follow-

ing information and any additional information, in such form and in such detail, as the Secretary may require:

(1) The legal capacity in which the person filing the report is acting with respect to the monetary instruments transported.

(2) The origin, destination, and route of the transportation.

(3) Where the monetary instruments are not legally and beneficially owned by the person transporting the same, or are transported for any purpose other than the use in his own behalf of the person transporting the same, the identities of the person from whom the monetary instruments are received, or to whom they are to be delivered, or both.

(4) The amounts and types of monetary instruments transported.

(c) Subsection (a) does not apply to any common carrier of passengers in respect of monetary instruments in the possession of its passengers, nor to any common carrier of goods in respect of shipments of monetary instruments not declared to be such by the shipper.

§ 232. Forfeiture

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 231(i) either has not been filed or contains material omissions or mistatements are subject to seizure and forfeiture to the United States.

(b) For the purpose of this section, monetary instruments transported by mail, by any common carrier, or by any messenger or bailee, are in process of transportation from the time they are delivered into the possession of the postal service, common carrier, messenger, or bailee until

the time they are delivered into or retained in the possession of the addressee or intended recipient or any agent of the addressee or intended recipient for purposes other than further transportation within, or across any border of, the United States.

§ 233. Civil Liability

The Secretary may assess a civil penalty upon any person who fails to file any report required under section 231, or who files such a report containing any material omission or misstatement. The amount of the penalty shall not exceed the amount of the monetary instruments with respect to whose transportation the report was required to be filed. The liabilities imposed by this chapter are in addition to any other liabilities, civil or criminal, except that the liability under this section shall be reduced by any amount actually forfeited under section 232.

§ 234. Remission of Forfeiture or Penalty

The Secretary may in his discretion remit any forfeiture or penalty under this chapter in whole or in part upon such terms and conditions as he deems reasonable and just.

§ 235. Enforcement Authority

(a) If the Secretary has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under section 231 of this title has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles.

Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law.

Chapter 4.
Foreign Transactions

§ 241. Records and Reports Required

(a) The Secretary of the Treasury, having due regard for the need to avoid impeding or controlling the export or import of currency or other monetary instruments and having due regard also for the need to avoid burdening unreasonably persons who legitimately engage in transactions with foreign financial agencies, shall by regulation require any resident or citizen of the United States, or person in the United States and doing business therein, who engages in any transaction or maintains any relationship, directly or indirectly, on behalf of himself or another, with a foreign financial agency to maintain records or to file reports, or both, setting forth such of the following information, in such form and in such detail, as the Secretary may require:

(1) The identities and addresses of the parties to the transaction or relationship.

(2) The legal capacities in which the parties to the transaction or relationship are acting, and the identities of the real parties in interest if one or more of the parties are not acting solely as principals.

(3) A description of the transaction or relationship including the amounts of money, credit, or other property involved.

(b) No person required to maintain records under this section shall be required to produce or otherwise disclose the contents of the records except in compliance with a subpena or summons duly authorized and issued or as may otherwise be required by law.

§242. Classifications and Requirements

The Secretary may prescribe:

(1) Any reasonable classification of persons subject to or exempt from any requirement imposed under section 241.

(2) The foreign country or countries as to which any requirement imposed under section 241 applies or does not apply if, in the judgment of the Secretary, uniform applicability of any such requirement to all foreign countries is unnecessary or undesirable.

(3) The magnitude of transactions subject to any requirement imposed under section 241.

(4) Types of transactions subject to or exempt from any requirement imposed under section 241.

(5) Such other matters as he may deem necessary to the application of this chapter.

Appendix C

31 C.F.R. § 103.

Note—After this litigation began and the District Court had rendered its opinion, the Secretary of the Treasury amended various sections of the Bank Secrecy Act regulations. See 37 Fed. Reg. 23114 (1972) and 38 Fed. Reg. 2174 (1973). For the convenience of the Court and counsel, we have set forth the amended regulations immediately following each of the sections to which the amendments apply. Additions to the original regulations are set in italics. Deletions are indicated by a line through the deleted word or words.

TITLE 31—MONEY AND FINANCE: TREASURY

Chapter I—Monetary Offices, Department of the Treasury

Subpart A—Definitions

§ 103.11 Meaning of Terms

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank;

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;

(6) a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that

title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

§ 103.11 Meaning of Terms [As Amended]

When used in this part and in forms prescribed under this part, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, terms shall have the meanings ascribed in this section.

Bank. (a) Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below.

(1) a commercial bank or trust company organized under the laws of any state or of the United States;

(2) a private bank;

(3) a savings and loan association or a building and loan association organized under the laws of any state or of the United States;

(4) an insured institution as defined in section 401 of the National Housing Act;

(5) a savings bank, industrial bank or other thrift institution;

(6) a credit union organized under the laws of any state or of the United States; and

(7) any other organization chartered under the banking laws of any state and subject to the supervision of the bank supervisory authorities of a state.

(b) Each agent, agency, branch or office within the United States of a foreign bank.

Broker or dealer in securities. A broker or dealer in securities, registered or required to be registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.

Currency. The coin and currency of the United States or of any other country, which circulate in and are customarily used and accepted as money in the country in which issued. It includes United States silver certificates, United States notes and Federal Reserve notes, but does not include bank checks or other negotiable instruments not customarily accepted as money.

Domestic. When used herein, refers to the doing of business within the United States, and limits the applicability of the provision wherein it appears to the performance by such institutions or agencies of functions within the United States.

Financial institution. Each agency, branch or office within the United States of any person doing business in one or more of the capacities listed below:

(1) a bank *(except bank credit card systems);*

(2) a broker or dealer in securities;

(3) a person who engages as a business in dealing in or exchanging currency as, for example, a dealer in foreign exchange or a person engaged primarily in the cashing of checks;

(4) a person who engages as a business in the issuing, selling or redeeming of travelers' checks, money orders, or similar instruments, except one who does so as a selling agent exclusively or as an incidental part of another business;

~~(5) an operator of a credit card system which issues, or authorizes the issuance of, credit cards that may be used for the acquisition of monetary instruments, goods, or services outside the United States;~~

(5) ~~(6)~~ a licensed transmitter of funds, or other person engaged in the business of transmitting funds abroad for others.

Foreign bank. A bank organized under foreign law, or an agency, branch or office located outside the United States of a bank. The term does not include an agent, agency, branch or office within the United States of a bank organized under foreign law.

Investment security. An instrument which

(1) is issued in bearer or registered form;

(2) is of a type or commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment;

(3) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(4) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer.

Monetary instruments. Coin or currency of the United States or of any other country, travelers' checks, money orders, investment securities in bearer form or otherwise in such form that title thereto passes upon delivery, and negotiable instruments (except warehouse receipts or bills of lading) in bearer form or otherwise in such form that title thereto passes upon delivery. The term does not include bank checks made payable to the order of a named person which have not been endorsed or which bear restrictive endorsements.

Person. An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, and all entities cognizable as legal personalities.

Secretary. The Secretary of the Treasury or any person duly authorized by the Secretary to perform the function mentioned.

Transaction in currency. A transaction involving the physical transfer of currency from one person to another. A transaction which is a transfer of funds by means of bank check, bank draft, wire transfer, or other written order, and which does not include the physical transfer of currency is not a transaction in currency within the meaning of this part.

United States. The various States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

Subpart B—Reports Required to Be Made

§ 103.21 Determination by the Secretary

The Secretary hereby determines that the reports required by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.22 Reports of Currency Transactions

Each financial institution shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000.

Except as otherwise directed in writing by the Secretary, this section shall not (1) require reports of transactions with Federal Reserve Banks or Federal Home Loan Banks; (2) require reports of transactions solely with, or originated by, financial institutions or foreign banks; or (3) require a bank to report transactions with an established customer maintaining a deposit relationship with the bank, in amounts which the bank may reasonably conclude do not exceed amounts commensurate with the customary conduct of the business, industry or profession of the customer concerned. A report listing such customers who engage in transactions which are not reported because of the exemption contained in this paragraph shall be made to the Secretary upon demand therefor made by him.

§ 103.23 Report of Transportation of Currency or Monetary Instruments

(a) Each person who physically transports, mails, or ships, or causes to be physically transported, mailed or shipped, currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion from the United States to any place outside the United States, or into the United States from any place outside the United States, shall make a report thereof. A person is deemed to have caused such transportation, mailing or shipping when he aids, abets, counsels, commands, procures

or requests it to be done by a financial institution or any other person. A transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by this section.

(b) Each person who receives in the United States currency or other monetary instruments in an aggregate amount exceeding $5,000 on any one occasion which have been transported, mailed, or shipped to such person from any place outside the United States with respect to which a report has not been filed under subsection (a) of this section, whether or not required to be filed thereunder, shall make a report thereof, stating the amount, the date of receipt, the form of monetary instruments, and the person from whom received.

(c) This section shall not require reports by (1) a federal reserve bank, (2) a bank, a foreign bank, or a broker or dealer in securities, in respect to currency or other monetary instruments mailed or shipped through the postal service or by common carrier, (3) a person who is not a citizen or resident of the United States in respect to currency or other monetary instruments mailed or shipped from abroad to a bank or broker or dealer in securities through the postal service or by common carrier, (4) a common carrier of passengers in respect to currency or other monetary instruments in the possession of its passengers, (5) a common carrier of goods in respect to shipments of currency or monetary instruments not declared to be such by the shipper, (6) a travelers' check issuer or its agent in respect to the transportation of travelers' checks prior to their delivery to selling agents for eventual sale to the public, nor by (7) a person engaged as a business in the transportation of currency, monetary instru-

ments and other commercial papers with respect to the transportation of currency or other monetary instruments overland between established offices of banks or brokers or dealers in securities and foreign banks.

(d) This section does not require that more than one report be filed covering a particular transportation, mailing or shipping of currency or other monetary instruments with respect to which a complete and truthful report has been filed by a person. However, no person required by subparagraphs (a) or (b) of this section to file a report shall be excused from liability for failure to do so if, in fact, a complete and truthful report has not been filed.

§ 103.24 Reports of Foreign Financial Accounts

Each person subject to the jurisdiction of the United States (except a foreign subsidiary of a United States person) having a financial interest in, or signature or other authority over, a bank, securities or other financial account in a foreign country shall report such relationship as required on his federal income tax return for each year in which such relationship exists, and shall provide such information concerning each such account as shall be specified in a special tax form to be filed by such persons.

§ 103.25 Filing of Reports

(a) Reports required to be filed by the first paragraph of Section 103.22 shall be filed on or before the forty-fifth day following that on which the reported transactions occur. They shall be filed with the Commissioner of Internal Revenue on forms to be prescribed by him, with the approval of the Secretary. All information called for in such forms shall be furnished.

(b) Reports required to be filed by Section 103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person entering or departing from the United States, such reports may be filed by mail on or before the date of entry, departure, mailing or shipping, with the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(c) Reports required to be filed by Section 103.23(b) shall be filed with the Commissioner of Customs within thirty days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at any port of entry or departure, or by mail addressed to the Commissioner of Customs, Attention: Currency Transportation Reports, Washington, D. C. 20226. They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished.

(d) Forms to be used in making the reports required by Sections 103.22 and 103.23 may be obtained from any Internal Revenue office; in addition, forms to be used in making the reports required by Section 103.23 may be obtained from any office of the Bureau of Customs.

§ 103.26 Identification Required

Before effecting any transaction with respect to which a report is required under the first paragraph of Section 103.22, a financial institution shall verify and record the identity, and record the account number on its books or the social security or taxpayer identification number, if any, of a person with whom or for whose account such transaction is to be effected. Verification of identity for a customer of the financial institution depositing or withdrawing funds may be by reference to his account or other number on the books of the institution. Verification of identity in any other case may be by examination, for example, of a driver's license, passport, alien identification card, or other appropriate document normally acceptable as a means of identification.

Subpart C—Records Required to be Maintained

§ 103.31 Determination by the Secretary

The Secretary hereby determines that the records required to be kept by this subpart have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings.

§ 103.32 Records to be Made and Retained by Persons Having Financial Interests in Foreign Financial Accounts

Records of accounts required by Section 103.24 to be reported on a federal income tax return shall be retained by each person having a financial interest in any such account. Such records shall contain the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the

type of such account, and the maximum value of each such account during the reporting period. Such records shall be retained for a period of five years and shall be kept at all times available for inspection as authorized by law. In the computation of the period of five years, there shall be disregarded any period beginning with a date on which the taxpayer is indicted or information instituted on account of the filing of a false or fraudulent federal income tax return or failing to file a federal income tax return, and ending with the date on which final disposition is made of the criminal proceeding.

§ 103.33 Records to be Made and Retained by Financial Institutions

Each financial institution shall retain either the original or a microfilm or other copy or reproduction of each of the following:

(a) a record of each extension of credit in an amount in excess of $5,000, except an extension of credit secured by an interest in real property, which record shall contain the name and address of the person to whom the extension of credit is made, the amount thereof, the nature or purpose thereof, and the date thereof;

(b) a record of each advice, request, or instruction received regarding a transaction which results in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account, or place outside the United States;

(c) a record of each advice, request, or instruction given to another financial institution or other person located within or without the United States, regarding a transaction intended to result in the transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

§ 103.34 Additional Records to be Made and Retained by Banks

(a) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such bank shall secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item other than bank charges or periodic charges made pursuant to agreement with the customer,

comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section:

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a person, account or place outside the United States;

(9) A record of each receipt of currency, other monetary instruments, checks, or investment securities, and of each transfer of funds or credit, of more than $10,000 received on any one ocasion directly and not through a domestic financial institution, from a person, account or place outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check deposited in such account through its domestic processing system or to supply a description of a deposited check. This subsection shall be applicable only with respect to demand deposits.

§ 103.34 Additional Records to be Made and Retained by Banks [As Amended]

(a)(1) With respect to each deposit or share account opened with a bank after June 30, 1972, by a person residing or doing business in the United States or by a citizen of the United States, such bank shall *within forty-five days from the date such an account is opened,* secure and maintain a record of the taxpayer identification number of the person maintaining the account; or in the case of an account of one or more individuals, such bank shall secure and maintain a record of the social security number of an individual having a financial interest in that account. *In the event that a bank has been unable to secure the identification required herein with respect to an account within the 45-day period specified, it shall nevertheless not be deemed to be in violation of this section if (i) it has made a reasonable effort to secure such identification, (ii) it maintains a list containing the names, addresses and account numbers of those persons from whom it has been unable to secure such identification, and makes the names, addresses and account numbers of those persons available to the Secretary as directed by him.*

(2) The 45-day period provided for in paragraph (a)(1) of this section shall be extended where the person opening the account has applied for a taxpayer identification or social security number on Form SS-4 or SS-5, until such time as the person maintaining the account has had a reasonable opportunity to secure such number and furnish it to the bank.

(3) A taxpayer identification number for a deposit or share account required under paragraph (a)(1) of this section need not be secured in the following instances: (i) accounts for public funds opened by agencies and in-

strumentalities of Federal, State, local or foreign governments, (ii) accounts for aliens who are (a) ambassadors, ministers, career diplomatic or consular officers, or (b) naval, military or other attachés of foreign embassies and legations, and for the members of their immediate families, (iii) accounts for aliens who are accredited representatives to international organizations which are entitled to enjoy privileges, exemptions and immunities as an international organization under the International Organization Immunities Act of December 29, 1945 (22 U.S.C. sec. 288), and for the members of their immediate families, (iv) aliens temporarily residing in the United States for a period not to exceed 180 days, (v) aliens not engaged in a trade or business in the United States who are attending a recognized college or university or any training program, supervised or conducted by any agency of the Federal Government, (vi) unincorporated subordinate units of a tax exempt central organization which are covered by a group exemption letter, (vii) interest bearing accounts maintained by a person under 18 years of age opened as part of a school thrift savings program, provided the annual interest does not exceed $10, and (viii) Christmas club, vacation club and similar installment savings programs provided the annual interest does not exceed $10. In instances described in paragraph (a)(3)(vii) and (viii) of this section, the bank shall, within fifteen days following the end of any calendar year in which the interest accrued in that year exceeds $10, use its best efforts to secure and maintain the appropriate taxpayer identification number or application form therefor.

(4) The rules and regulations issued by the Internal Revenue Service under Section 6109 of the Internal Revenue

Code of 1954 shall determine what constitutes a taxpayer identification number and whose number shall be obtained in the case of an account maintained by one or more persons.

(b) Each bank shall, in addition, retain either the original or a microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature authority over each deposit or share account;

(2) Each statement, ledger card or other record on each deposit or share account, showing each transaction in, or with respect to, that account;

(3) Each check, clean draft, or money order drawn on the bank or issued and payable by it, except those drawn ***for $100 or less or those drawn*** on accounts which can be expected to have drawn on them an average of at least 100 checks per month over the calendar year or on each occasion on which such checks are issued, and which are (i) dividend checks, (ii) payroll checks, (iii) employee benefit checks, (iv) insurance claim checks, (v) medical benefit checks, (vi) checks drawn on governmental agency accounts, (vii) checks drawn by brokers or dealers in securities, (viii) checks drawn on fiduciary accounts, (ix) checks drawn on other financial institutions, or (x) pension or annuity checks;

(4) Each item ***in excess of $100*** (other than bank charges or periodic charges made pursuant to agreement with the customer), comprising a debit to a customer's deposit or share account, not required to be kept, and not specifically exempted, under subparagraph (b)(3) of this section:

(5) Each item, including checks, drafts, or transfers of credit, of more than $10,000 remitted or transferred to a person, account or place outside the United States;

(6) A record of each remittance or transfer of funds, or of currency, other monetary instruments, checks, invest-

ment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(7) Each check or draft in an amount in excess of $10,000 drawn on or issued by a foreign bank, purchased, received for credit or collection, or otherwise acquired by the bank;

(8) Each item, including checks, drafts or transfers of credit, of more than $10,000 received directly and not through a domestic financial institution, by letter, cable or any other means, from a *bank, broker or dealer in foreign exchange* ~~person, account or place~~ outside the United States;

(9) A record of each receipt of currency, other monetary instruments, investment securities or checks, ~~or investment securities,~~ and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from a *bank, broker or dealer in foreign exchange* ~~person, account or place~~ outside the United States; and

(10) Records prepared or received by a bank in the ordinary course of business, which would be needed to reconstruct a demand deposit account and to trace a check *in excess of $100* deposited in such account through its domestic processing system or to supply a description of a deposited check *in excess of $100*. This subsection shall be applicable only with respect to demand deposits.

§ 103.35 Additional Records to Be made and Retained by Brokers and Dealers in Securities

(a) With respect to each brokerage account opened with a broker or dealer in securities after June 30, 1972, by a person residing or doing business in the United States or a citizen of the United States, such broker or dealer shall secure and maintain a record of the taxpayer identification

number of the person maintaining the account; or in the case of an account of one or more individuals, such broker or dealer shall secure and maintain a record of the social security number of an individual having a financial interest in that account.

(b) Every broker or dealer in securities shall, in addition, retain either the original or microfilm or other copy or reproduction of each of the following:

(1) Each document granting signature or trading authority over each customer's account;

(2) Each record described in section 240.17a-3(a)(1), (2), (3), (5), (6), (7), (8) and (9) of Title 17, Code of Federal Regulations;

(3) A record of each remittance or transfer of funds, or of currency, checks, other monetary instruments, investment securities, or credit, of more than $10,000 to a person, account or place outside the United States;

(4) A record of each receipt of currency, other monetary instruments, checks, or investment securities and of each transfer of funds or credit, of more than $10,000 received on any one occasion directly and not through a domestic financial institution, from any person, account or place outside the United States.

§ 103.35 Additional Records to be Made and Retained by Brokers and Dealers in Securities [As Amended]

3. Subpart C is further amended by amending § 103.35 by deleting "paragraph (1)" in paragraph (a)(2), and substituting therefore the words "paragraph (a)(1) of this section"; and by deleting "subsection (1)" in paragraph (a)(3), and substituting therefor the words "paragraph (a)(1) of this section."

§ 103.36 Nature of Records and Retention Period

(a) Wherever it is required that there be retained either the original or a microfilm or other copy or reproduction of a check, draft, monetary instrument, investment security, or other similar instrument, there shall be retained a copy of both front and back of each such instrument or document, except that no copy need be retained of the back of any instrument or document which is entirely blank or which contains only standardized printed information, a copy of which is on file.

(b) Records required by this subpart to be retained by financial institutions may be those made in the ordinary course of business by a financial institution. If no record is made in the ordinary course of business of any transaction with respect to which records are required to be retained by this subpart, then such a record shall be prepared in writing by the financial institution.

(c) Records which are required by Section 103.34(b)(10) to be retained by banks shall be retained for a period of two years. All other records which are required by this subpart to be retained by financial institutions shall be retained for a period of five years. All such records shall be filed or stored in such a way as to be accessible within a reasonable period of time, taking into consideration the nature of the record, and the amount of time expired since the record was made.

§ 103.37 Person Outside the United States

For the purposes of this subpart, a remittance or transfer of funds, or of currency, other monetary instruments, checks, investment securities, or credit to the domestic account of a person whose address is known by the person

making the remittance or transfer, to be outside the United States, shall be deemed to be a remittance or transfer to a person outside the United States, except that, unless otherwise directed by the Secretary, this section shall not apply to a transaction on the books of a domestic financial institution involving the account of a customer of such institution whose address is within approximately fifty miles of the location of the institution, or who is known to be temporarily outside the United States.

Subpart D—General Provisions

§ 103.41 Dollars as Including Foreign Currency

Wherever in this part an amount is stated in dollars, it shall be deemed to mean also the equivalent amount in any foreign currency.

§ 103.42 Photographic or Other Reproductions of Government Obligations

Nothing herein contained shall require or authorize the microfilming or other reproduction of

(1) currency or other obligation or security of the United States as defined in 18 U.S.C. 8, or

(2) any obligation or other security of any foreign government,

the reproduction of which is prohibited by law.

§ 103.43 Availability of Information

The Secretary may make any information set forth in any reports received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired,

the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought, and the official need therefor.

§ 103.43 Availability of Information [As Amended]

The Secretary may make any information set forth in any report received pursuant to this part available to any other department or agency of the United States upon the request of the head of such department or agency, made in writing and stating the particular information desired, the criminal, tax, or regulatory investigation or proceeding in connection with which the information is sought, and the official need therefor. *Any information made available under this section to other departments or agencies of the United States shall be received by them in confidence, and shall not be disclosed to any person except for official purposes relating to the investigation or proceeding in connection with which the information is sought.*

§ 103.44 Disclosure

All reports required under this part and all records of such reports are specifically exempted from disclosure under section 552 of Title 5, United States Code.

§ 103.45 Exceptions, Exemptions, Modifications, and Reports

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, grant exemptions from, impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify, the requirements of this part. Such exceptions, exemptions, requirements or modifications may be conditional or unconditional, may apply to particular persons or to classes

of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.45 Exceptions, Exemptions, ~~Modifications~~, and Reports [As Amended]

(a) The Secretary, in his sole discretion, may by written order or authorization make exceptions to, *or* grant exemptions from, ~~impose additional recordkeeping or reporting requirements authorized by statute, or otherwise modify,~~ the requirements of this part. Such exceptions, *or* exemptions, ~~requirements or modifications~~ may be conditional or unconditional, may apply to particular persons or to classes of persons, and may apply to particular transactions or classes of transactions. They shall, however, be applicable only as expressly stated in the order or authorization, and they shall be revocable in the sole discretion of the Secretary.

(b) The Secretary shall have authority to further define all terms used herein.

§ 103.46 Enforcement

(a) Responsibility for assuring compliance with the requirements of this part is delegated as follows:

(1) to the Comptroller of the Currency, with respect to national banks and banks in the District of Columbia;

(2) to the Board of Governors of the Federal Reserve System, with respect to state bank members of the Federal Reserve System;

(3) to the Federal Home Loan Bank Board, with respect to insured building and loan associations, insured savings and loan associations, and insured institutions as defined in section 401 of the National Housing Act;

(4) to the Administrator of the National Credit Union Administration, with respect to federal credit unions;

(5) to the Federal Deposit Insurance Corporation, with respect to all other banks except agents of foreign banks which agents are not supervised by state or federal bank supervisory authorities;

(6) to the Securities and Exchange Commission, with respect to brokers and dealers in securities;

(7) to the Commissioner of Customs with respect to § 103.23 and § 103.48;

(8) to the Commissioner of Internal Revenue except as otherwise specified in this section.

(b) Over-all responsibility for coordinating the procedures and efforts of the agencies listed herein and assuring compliance with this part, is delegated to the Assistant Secretary (Enforcement, Tariff and Trade Affairs, and Operations). Periodic reports shall be made by each such agency to the Assistant Secretary, with copies to the General Counsel of the Treasury Department and to the Commissioner of Internal Revenue.

§ 103.47 Civil Penalty

(a) For any willful violation of any requirement of this part, the Secretary may assess upon any domestic financial institution, and upon any partner, director, officer or employee thereof who willfully participates in the violation, a civil penalty not exceeding $1,000.

(b) For any failure to file a report required under Section 103.23 or for filing such a report containing any

material omission or misstatement, the Secretary may assess a civil penalty up to the amount of the currency or monetary instruments transported, mailed or shipped, less any amount forfeited under Section 103.48.

§ 103.48 Forfeiture of Currency or Monetary Instruments

Any currency or other monetary instruments which are in the process of any transportation with respect to which a report is required under Section 103.23 are subject to seizure and forfeiture to the United States if such report has not been filed as required in Section 103.25, or contains material omissions or misstatements. The Secretary may, in his sole discretion, remit or mitigate any such forfeiture in whole or in part upon such terms and conditions as he deems reasonable.

§ 103.49 Criminal Penalty

(a) Any person who willfully violates any provision of this part may, upon conviction thereof, be fined not more than $1,000 or be imprisoned not more than one year, or both. Such person may in addition, if the violation is of any provision authorized by Title I of Public Law 91-508 and if the violation is committed in furtherance of the commission of any violation of Federal law punishable by imprisonment for more than one year, be fined not more than $10,000 or be imprisoned not more than five years, or both.

(b) Any person who willfully violates any provision of Title II of Public Law 91-508, or of this part authorized thereby, where the violation is either

(1) committed in furtherance of the commission of any other violation of Federal law, or

(2) committed as part of a pattern of illegal activity involving transactions exceeding $100,000 in any twelve-month period, may, upon conviction thereof, be fined not more than $500,000 or be imprisoned not more than five years, or both.

(c) Any person who knowingly makes any false, fictitious or fraudulent statement or representation in any report required by this part may, upon conviction thereof, be fined not more than $10,000 or be imprisoned not more than 5 years, or both.

§ 103.50 Enforcement Authority with respect to Transportation of Currency or Monetary Instruments

(a) If the Secretary has reason to believe that currency or monetary instruments are in the process of transportation and with respect to which a report required under Section 103.23 of this part has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:

(1) One or more designated persons.

(2) One or more designated or described places or premises.

(3) One or more designated or described letters, parcels, packages, or other physical objects.

(4) One or more designated or described vehicles. Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.

(b) This section is not in derogation of the authority of the Secretary under any other law or regulation.

§ 103.51 Effective Date

This part shall become effective July 1, 1972.

§ 103.51 Access to records [As Amended]

~~This part shall become effective July 1, 1972.~~

Except as provided in §§ 103.34(a)(1) and 103.35(a)(1), and except for the purpose of assuring compliance with the recordkeeping and reporting requirements of this part, this part does not authorize the Secretary or any other person to inspect or review the records required to be maintained by subpart C of this part. Other inspection, review or access to such records is governed by other applicable law.